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No. 150

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE HYAM, ET AL., *Appellants*

v.

UPPER MONTGOMERY JOINT AUTHORITY and the BOROUGHS OF EAST GREENVILLE, PENNSBURG AND RED HILL, *Appellees*

*ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA*

## MOTION TO DISMISS

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## MOTION TO DISMISS

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Having previously raised no federal question, appellants in their petition for rehearing before the Supreme Court of Pennsylvania for the first time urged infringement of their rights under the Fifth and Fourteenth Amendments of the United States Constitution in their action to enjoin, as "costly and insufficient," construction of a sewage system by appellees. The Pennsylvania Supreme Court, which had dismissed

appellants' complaint as a matter of state law, denied the petition for rehearing without intimating any view as to the merits of the untimely raised federal questions.

Accordingly, appellees move the Court to dismiss this appeal pursuant to paragraph 1 of Rule 16 for the reasons that (1) the federal questions sought to be reviewed were not timely raised by appellants, or expressly decided by the Supreme Court of Pennsylvania; (2) the judgment sought to be reviewed rests on an adequate non-federal basis; and (3) the appeal does not in any event present a substantial federal question.

## OPINION BELOW

The unanimous opinion of the Supreme Court of Pennsylvania dismissing appellants' complaint, not yet officially reported, is unofficially reported at 160 A. 2d 539.

## STATEMENT

On March 21, 1960, appellants filed a complaint in the Common Pleas Court of Montgomery County, Pennsylvania, seeking to block construction of a sewage system that had been jointly undertaken by appellees.[1] (Juris. St. p. 15a)

The project whose construction was sought to be enjoined culminated fourteen years of exhaustive

[1] The appellee Boroughs are incorporated political subdivisions of the Commonwealth of Pennsylvania possessing legislative and governmental powers. The appellee Joint Authority was created by the Boroughs under state law to construct a sewage system serving their inhabitants. (See n. 2, p. 3, *infra*)

investigation by the three Boroughs into the most feasible and economical means to solve sewage problems which had been highlighted by an order from the Sanitary Water Board of Pennsylvania on October 4, 1946 that the Boroughs stop discharging their sewage into waters of the Commonwealth. (Juris. St. p. 6a) Impelled by that directive to take immediate action, the Boroughs authorized engineering surveys of their areas to be made. Since preliminary surveys demonstrated that subsurface drainage problems precluded disposal of sewage by individual householders, further surveys were authorized for a joint community system. *Ibid.* In 1948 and again in 1958, reports and cost estimates were submitted by the consulting engineers employed by the Boroughs. (Juris. St. p. 4a)

On May 7, 1958, the Boroughs simultaneously adopted resolutions authorizing creation of the appellee Joint Authority to construct and operate a sewage system for the Boroughs in accordance with the Pennsylvania Municipal Authorities Act of 1945.[2]

On February 5, 1960, at the request of counsel for appellants, appellees jointly conducted a public hearing on the final engineering report and construction plans. (Juris. St. p. 7a) This was the latest of numerous hearings held by appellees to air publicly every aspect of the sewage problem, including the increased cost of

[2] This legislation allows any municipality, by itself or jointly with other municipalities, to organize an authority for the purpose of constructing and operating public improvements such as sewage systems, waterworks and school buildings. Pa. Stat. Ann. tit. 53, §§ 301-322 (1957). The Act's validity under the state constitution was upheld by the Pennsylvania Supreme Court in *Evans v. West Norriton Township Municipal Authority*, 370 Pa. 150, 87 A. 2d 474 (1952).

the system as finally approved over earlier engineering estimates. (Juris. St. pp. 4a-7a)[3]

Being satisfied that fourteen years of unrestricted public debate had exhausted, but not remedied, their sewage problem and that further hearings would not be profitable, appellees moved ahead after the hearing to construct the system. Accordingly, on February 8, 1960, the Boroughs simultaneously enacted ordinances formally approving the Joint Authority's construction plan, the estimated cost of the facilities assessable in each Borough, the estimated cost of the entire system as computed from the lowest of seven competitive bids and the Joint Authority's proposal to assess approximately $870,000 of the total cost against the properties benefited in accordance with Pennsylvania's statutory front foot rule. (Juris. St. p. 17a)

On the same day, a small group of property owners, including three of the present appellants, instituted an action in the Common Pleas Court of Montgomery County to enjoin construction of the sewage system. (Juris. St. p. 7a) Three days later this action was voluntarily withdrawn. *Ibid.*

Thereafter, on March 7, 1960, the Boroughs simultaneously enacted ordinances formally approving an agreement with the Joint Authority for construction of a sewage collection system, a treatment plant and re-

[3] Appellants complain (Juris. St. p. 6) that the increased cost of the system was not "satisfactorily" explained. But as the court below noted, and as was explained to appellants at the hearing, the 1960 cost reflected "the larger number of dwelling units to be serviced" as well as "the tremendous and unprecedented rise in the cost of construction of *any* project during the fourteen year period between 1946 and 1960 and other factors." (Juris. St. p. 8a) (emphasis in original)

lated facilities to serve their inhabitants. (Juris. St. p. 3a) In the meantime, the Joint Authority arranged for the sale of its bonds to finance the project and delivery of the bonds was scheduled for March 29, 1960. (Juris. St. pp. 6a-8a)

Before delivery of the bonds was effected, the present complaint was filed on March 21, 1960, seeking to enjoin construction of the sewage system. (Juris. St. p. 15a)[4] The complaint alleged that according to a report prepared by engineers hired by appellants the sewage system approved by appellees was "not economically feasible," was "not a complete sewer system" and would only "partially" abate sewage discharge into the waters of the Commonwealth. (Juris. St. p. 20a) On March 31, 1960, appellees filed a motion to dismiss the complaint on the ground that it did not state facts sufficient to entitle appellants to relief. (Juris. St. p. 2a)

On the same day, appellees petitioned the Supreme Court of Pennsylvania to assume original jurisdiction of the proceeding pursuant to Section 3 of Article V of the Pennsylvania Constitution. *Ibid.* Over appellants' objection, the Supreme Court granted the petition. (Juris. St. pp. 2a-3a)

The case was heard by the Pennsylvania Supreme Court on appellants' complaint and appellees' prelimi-

[4] Since a non-litigation certificate must accompany the bonds, the current litigation has seriously delayed the project. If further delay is encountered, there is a substantial possibility that appellees will lose a contribution of one quarter of one million dollars from the federal government pursuant to the federal Water Pollution Control Act, 33 U.S.C. §§ 466-466k, which authorizes grants to states to "assist them" in meeting the costs of establishing and maintaining adequate measures for the prevention and control of water pollution." § 466 d(a).

nary objections in the nature of a demurrer that appellants had failed to allege facts which would warrant judicial inquiry into the feasibility or adequacy of this local public improvement. (Juris. St. p. 2a)

In their supporting brief, appellants renewed their objection to the court's discretionary exercise of its original jurisdiction and contended that, in any event, they were entitled to a hearing in the Common Pleas Court in order to prove their allegations that the proposed sewage system was "costly and insufficient." According to their brief,

> "It will be necessary to remand this case to the Court of Common Pleas for a hearing to determine the facts, either (a) because the case presents no unusual exigencies sufficient to justify the Supreme Court in retaining original jurisdiction; or (b) because the controversy is a factual one which cannot be disposed of as a matter of law on defendants' demurrer and which requires a hearing on the allegations in the complaint as to arbitrary and capricious conduct on the part of the defendants amounting to a manifest abuse of discretion and bad faith." (Plaintiffs' Br. p. 7)

The Pennsylvania Supreme Court unanimously rejected appellants' arguments and dismissed their complaint on April 26, 1960. As analyzed by that court,

> "the thrust of the [appellants'] accusations is that the Authority's consulting engineers estimated the cost of the proposed construction in 1946 at $763,000 whereas the same engineers, in 1960, estimated the cost of the proposed construction at $2,592,000." (Juris. St. p. 8a)

But,

> "taking into consideration the larger number of dwelling units to be serviced, the tremendous and

> unprecedented rise in the cost of construction of *any* project during the fourteen year period between 1946 and 1960 and other factors, the increase in the estimated costs of this project between 1946 and 1960 does not, standing alone, justify our interposition in this matter." *Ibid.* (emphasis in original)

Emphasizing that under its prior decisions a showing of "fraud, official misconduct, arbitrary and capricious abuse of power or discretion by municipal officials [would] justify judicial intervention," the court found that appellants' allegations did not constitute such a showing, but instead were "generalities and conclusions unsupported by factual averments." (Juris. St. pp. 8a-9a) Moreover, even "assuming the truth of all the well pleaded, material and relevant facts and inferences reasonably deducible therefrom, such facts and inferences do not establish any such abuse of discretion or arbitrary and capricious action on the part of these municipal officials as warrants judicial interference." *Ibid.* For "unless it can be shown—and the fact alleged in the complaint, even if proven, do not so show—that the discretion and judgment of such officials have been motivated by fraud or by complete lack of responsibility or by arbitrary considerations or capricious beliefs, no court should substitute its judgment for that of such officials." (Juris. St. p. 11a)

As to appellants' request for a hearing on the factual allegations of their complaint, the court declared that "even if such hearing were held and *all* the facts alleged in the complaint were *proven*, judicial interference would be unwarranted." (Juris. St. pp. 8a-9a) (emphasis in original) For the most that appellants could prove at such a hearing would be that the "proposed

plan is not as complete as it might be, that it involves a greater expenditure of money than the results would justify or that it was unwise at this time to enter upon such a plan." (Juris. St. pp. 10a-11a) But these are matters which the Pennsylvania legislature has committed to the "discretion and judgment of the Authority and Borough Officials and upon them has been placed the responsibility under the law for such determination and judgment." *Ibid.* Any other view, the court concluded, "would constitute an unwarranted judicial interference with the duties of duly appointed and elected public officials." *Ibid.*[5]

On May 5, 1960, appellants filed a petition for rehearing. Besides reiterating their previous contentions that the proposed system was "costly and insufficient," appellants urged, for the first time, that "to allow the [appellees] to proceed with the construction and operation of their proposed sewer system and with the proposed imposition of monetary assessments upon the properties of the [appellants] for the cost thereof, without first granting the [appellants] an opportunity to be heard and to have judicial review of the facts" violated federal constitutional rights. (Pet. p. 6)[6]

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[5] In view of its disposition of the case, the court did not reach the question of laches also raised by appellees. (Juris. St. p. 11a)

[6] Actually, at no time prior to their petition for rehearing did appellants contend, *even as a matter of state law*, that they were entitled to the hearing which they in fact received before appellees. The only forum in which appellants claimed a right to be heard was the Common Pleas Court (Plaintiffs' Br. p. 7)—which is just another way of saying that the issue before the Pennsylvania Supreme Court was whether their complaint set forth a claim entitling them to relief. If it had, they would have gotten a hearing in the Common Pleas Court. (Juris. St. p. 8a, n. 5)[7] But what appellants wanted to prove, *i.e.*, "that the proposed plan

Without expressing any view as to these untimely raised questions, the Pennsylvania Supreme Court denied the rehearing petition on May 26, 1960. (Juris. St. p. 12a)

## ARGUMENT

As will be detailed, the court below decided the only question presented to it, *i.e.*, whether, as a matter of state law, appellants had alleged facts warranting judicial intervention to review the feasibility and adequacy of a joint public improvement by appellees. The court did not pass upon any federal question involving the alleged right of appellants to a hearing, either before appellees or the Common Pleas Court, since those questions were untimely raised for the first time in their petition for rehearing. On this record, there is no basis for review of the decision below by this Court.

Moreover, appellants were in fact given notice and afforded numerous opportunities to be heard by appellees before the proposed sewage system was finally approved, and hence were accorded all of the rights to which they were properly entitled. In addition, no litigant has a constitutional right to an evidentiary hearing on a complaint that fails to state a claim upon which relief can be granted. Consequently, no substantial federal question would be raised by this appeal even if appellants had properly presented their claims under the Constitution of the United States to the court below.

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is not as complete as it might be, that it involves a greater expenditure of money than the results would justify or that it was unwise at this time to enter upon such a plan," did not entitle them to a hearing. (Juris. St. pp. 10a-11a)

## I.

### *The Court Below Did Not Decide Any of the Federal Questions Untimely Raised by Appellants, and Its Decision Rests on an Adequate State Ground*

The sole question decided by the Supreme Court of Pennsylvania was that appellants' complaint, when tested by *state* standards for judicial review of legislative action by municipal officials, did not allege facts which would warrant judicial inquiry into the economic feasibility or operational sufficiency of a sewage system. As explained by that court, "Absent any allegations in this complaint of either fraud or misconduct and absent any allegations of fact which would indicate that these municipal officials have acted or are acting either in abuse of their power or in a capricious or arbitrary manner, judicial intervention cannot be justified." (Juris. St. p. 10a) This holding is fully consistent with controlling state law and constitutes an unassailable ground for decision and disposition of the case.

Appellants' effort to transform that ruling into a decision in favor of a state statute whose validity was drawn in question as repugnant to the Constitution of the United States is not only specious, but is belied by appellants' unavoidable concession that the federal questions sought to be reviewed here were raised for the first time in their petition for rehearing addressed to the Supreme Court of Pennsylvania. (Juris. St. p. 13)[7]

[7] Appellants cannot protest that the petition for rehearing was their first opportunity to raise these questions. Essentially the same grounds of objection were raised throughout the proceeding, but solely as a matter of state law. In both the Common Pleas Court and Pennsylvania Supreme Court there was every opportunity to cast these objections in terms of federal constitutional

Equally baseless is the mute premise of appellants' jurisdictional statement that the court below did in fact rule on the merits of their afterthought argument that federal questions were actually buried somewhere in their original attack on the sewer project. This premise, nowhere referenced to the text of the opinion below, defies confirmation in either the state court's basic decision on the merits or its summary two-word denial of the petition for rehearing. (Juris. St. p. 12a)[8]

Plainly revealing no decision below as to any of the federal questions sought to be reviewed here, the record thus defeats this appeal. For it is axiomatic that federal questions first presented to the highest state court in a petition for rehearing come too late for consideration in this Court unless the state court actually entertains and expressly decides the questions.[9] In short, this Court sits to review significant federal questions

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rights. Nor can appellants claim that the federal questions sought to be reviewed arose from an unanticipated disposition of the proceeding by the Supreme Court of Pennsylvania. Cf. *Brinkerhoff Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930); *Ohio* v. *Akron Metropolitan Park District*, 281 U.S. 74, 79 (1930).

[8] The Pennsylvania Supreme Court's refusal to entertain and decide the federal questions raised for the first time in the petition for rehearing conformed in all respects with that court's rehearing practice. See, for example, *In re Dorrance's Estate*, 172 Atl. 900 (Pa. 1933), *affirming*, 309 Pa. 151, 163 Atl. 303 (1932), *cert. denied*, 287 U.S. 660 (1932), 288 U.S. 617 (1933).

[9] *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945); *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935); *American Security Co.* v. *Baldwin*, 287 U.S. 156, 163-164 (1932); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181 (1919); *Forbis* v. *State Council of Virginia*, 216 U.S. 396, 399 (1910); *Simmerman* v. *Nebraska*, 116 U.S. 54 (1885); and compare *Dorrance* v. *Pennsylvania*, 287 U.S. 660, 661 (1932).

actually decided by state courts, not undecided questions untimely raised by counsel.

## II.

### *The Federal Questions Sought To Be Reviewed Are Without Merit*

In any event, assuming that the federal questions sought to be reviewed are properly here, they are nonetheless totally without merit.

In the first place, with respect to appellants' belated contention that they were entitled to a hearing before the appellee Boroughs and Joint Authority, the facts are that appellees publicly announced what action was contemplated, invited comments and permitted arguments to be made at numerous public meeting hearings in order to insure informed action on their part and to give their inhabitants every chance to influence the final decision. (Juris. St. pp. 4a-7a) Thus, numerous public hearings *were* held to consider the sewage problem and its solution. Indeed, one of these hearings was called at appellants' own request to consider the very matters which form the basis for their complaint that the proposed sewage system is "costly and insufficient." (Juris. St. p. 6, 7a)

No more was required by either the Fifth or Fourteenth Amendments. For surely fourteen years of public debate, punctuated by numerous public hearings, satisfies even the most rigorous demands of the Constitution. Particularly appropriate here is the recognition by Mr. Justice Holmes in *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915), that "there must be a limit to individual argument in such matters if government is to go on." *Id.* at 445.

Appellants' undocumented assertion that the hearing which they admittedly were afforded was "not a 'hearing' within the meaning of procedural due process" (Juris. St. p. 6) is hardly enlightening as to what more was necessary than open and unrestricted public meeting hearings. If by that claim appellants are contending that they were entitled to a judicial, rather than legislative, type hearing before these municipal bodies, they have grievously misread the decisions of this Court.

Municipal governments, like state legislatures, by reason of their representative character, may act without providing opportunity for formal party participation. *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915). Instead, as was done here, it is customary to afford opportunity for public participation by informal legislative type hearings. Cf. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 303 308 (1933).[10] Only a most extravagant view, one which is oblivious to the basic and traditional differences between the legislative and the judicial functions, would require a courtroom type proceeding to determine matters of public im-

[10] Even this type of hearing is not always indispensable, for "the Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915). See, for example, *Chesebro* v. *Los Angeles County Flood Control District*, 306 U.S. 459, 463-465 (1939); *Browning* v. *Hooper*, 269 U.S. 396, 405 (1926); *Hancock* v. *Muskogee*, 250 U.S. 454, 455-458 (1919); *Withnell* v. *Ruecking Construction Co.*, 249 U.S. 63, 68-70 (1919).

Statutes such as the Administrative Procedure Act expressly codify the distinction between legislative and judicial type hearings. Compare Section 4(b) with Sections 5 and 7 of that Act. 5 U.S.C. §§ 1003(b), 1004, 1006.

provements. Such a procedure—clumsy, expensive and inefficient when applied to the legislative process—has never been a constitutional requirement for the conduct of local legislative affairs. See *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915); cf. *Bell's Gap R.R. Co.* v. *Pennsylvania*, 134 U.S. 232, 239 (1890).

Appellants' demand for an evidentiary hearing on their complaint in the state Common Pleas Court is also untenable.

As detailed above, the Supreme Court of Pennsylvania unanimously dismissed the complaint because, as a matter of state law, appellants had failed to allege facts which would warrant judicial inquiry into the economic feasibility or operational sufficiency of the contemplated sewage system. According to that court, the most that appellants could prove at a hearing in the Common Pleas Court would be that the proposed plan is not as complete as it might be, that it involves greater expenditure of money than the results would justify or that it was unwise at this time to enter upon such a plan." (Juris. St. pp. 10a-11a) Such evidence, however, would not have warranted judicial intrusion into matters committed to the "discretion and judgment of the Authority and Borough Officials." *Ibid.* Clearly, that decision does not, as argued by appellants, insulate arbitrary and capricious action by municipal officials from judicial review; nor was it intended to relieve those officials of the pertinent demands of due process. (Juris. St. p. 9a)[11]

[11] Similarly far-fetched is appellants' claim that the Pennsylvania Municipal Authorities Act violates the Fourteenth Amendment because it makes no express provision for judicial review. (Juris. St. p. 3) In the first place, the Act does provide for judicial review

There is obviously no constitutional right to a hearing on a complaint that fails to state a claim upon which relief can be granted. Indeed, if that were the law, Rule 12(b)(6) of the Federal Rules of Civil Procedure, which authorizes federal district courts to dismiss complaints for "failure to state a claim upon which relief can be granted," would be unconstitutional.[12]

*Nashville, C. & St. Louis Ry.* v. *Walters*, 294 U.S. 405 (1935), one of the few relevant cases cited in the jurisdictional statement (p. 16), confirms the correctness of the decision below.[13] In that case, this Court

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as the Pennsylvania Supreme Court noted in *Mistick* v. *Cammack*, 397 Pa. 296, 154 A. 2d 588 (1959). Secondly, in the case at bar, the Pennsylvania Supreme Court declared that "fraud, official misconduct, arbitrary and capricious abuse of power or discretion by municipal officials" will in all events warrant judicial review. (Juris. St. p. 9a)

[12] A motion to dismiss under Rule 12(b)(6) performs substantially the same function as appellees' common law demurrer in the court below. 2 Moore, Federal Practice ¶ 12.08 (2d ed. 1948). Cf. *Chesebro* v. *Los Angeles County Flood Control District*, 306 U.S. 459 (1939); *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176 (1935).

Only six months before, in *Mistick* v. *Cammack*, 397 Pa. 296, 154 A. 2d 588 (1959) (where, as here, the Pennsylvania Supreme Court had assumed original jurisdiction over a proceeding to enjoin construction of a water system), after appraising the complaint upon demurrer, the court remanded the proceeding to the Common Pleas Court for an evidentiary hearing because that complaint, unlike the one here, "set forth a valid cause of action, which, if proved, would entitle him to the relief he seeks." 154 A. 2d at 590.

[13] Appellees agree that *Thompson* v. *Louisville*, 362 U.S. 199 (1960) (discussed in the jurisdictional statement at page 19) is a "grand" case, but its relevance here is difficult to discover. The cases cited at pages 15 and 18 of the jurisdictional statement are equally remote.

reversed a decision by the Supreme Court of Tennessee because the state court had "declined to consider the special facts relied upon as showing that the order, and the statute as applied, were arbitrary and unreasonable." *Id.* at 414. Writing for this Court, Mr. Justice Brandeis explained that the Tennessee Supreme Court, unlike the court below, did not find that the "evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State * * * was arbitrary and unreasonable," but instead simply refused to consider them at all. *Id.* at 415-416. Surely appellants can gain no comfort from that case since the court here did precisely what the Tennessee court had failed to do, *i.e.*, carefully considered the factual averments in the complaint to determine whether they set forth a claim entitling appellants to relief.

## CONCLUSION

The burden rests heavily upon one who seeks to use the federal constitution to strike down public improvements by municipalities dealing with health hazards to their inhabitants. Essential to Supreme Court review in such cases is that the federal question shall have

been timely raised and actually decided by the highest state court. That was not done in the case at bar.

Accordingly, the appeal should be dismissed.

Respectfully submitted,

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